

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c.1.8
AS AMENDED SECTION 268 AND REGULATION 283/95 MADE
THEREUNDER**

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17 AS
AMENDED**

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIFUND ASSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Derek R J Greenside for the Applicant

Kaili Toome for the Respondent

ISSUES:

Does the Zurich policy issued in this matter extend accident benefits to Mr. Gurpal Sandhu?

DECISION:

The Zurich policy does not extend accident benefits to Mr. Gurpal Sandhu.

HEARING:

This matter was conducted by way of written submissions and documentary evidence submitted by the parties.

FACTS AND ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on September 27, 2014, in which the injured party, Mr. Gurpal Sandhu ("Mr. Sandhu") was operating a 2006 Acura TC owned by his father, Mr. Resham Sandhu, and insured by the Applicant Unifund Assurance Company ("Unifund").

At the time of the accident Mr. Sandhu was not a listed driver on his father's policy with Unifund, however, he was a listed driver under an automobile policy issued to Yess Management Inc. by the Respondant, Zurich Insurance Company ("Zurich").

The Applicant, Unifund, takes the position that since Mr. Sandhu was a listed driver on an automobile owned by Yess Management and insured by Zurich, then Zurich should be responsible for the payment of the applicable accident benefits.

With respect to priority, Unifund relies on Section 268(2) of the Insurance Act which states:

The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Unifund then turns to Section 3 of the Statutory Accident Benefits Schedule which defines an “insured person” as a,

in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario.

The Respondant, Zurich, contends that Mr. Sandhu is not entitled to accident benefit coverage under the Zurich policy as he is not a “named insured” on the Zurich Certificate Automobile Insurance, but only a “listed driver” under that policy.

Zurich further contends that Mr. Sandhu was an employee of Yess Management Inc., and since he was operating a vehicle owned by his father at the time of the accident he is excluded from seeking accident benefits pursuant to Section 2.2.3 of the Ontario Automobile Policy (“OAP1”).

Section 1.3 of the OAP1 distinguishes between a “described automobile” and “the automobile” with the “described automobile” being one specifically shown of Certificate of Insurance. Section 2.2.3 of the OAP1 extends coverage to the specified individuals when operating an automobile other than the described automobile if certain specified conditions are satisfied. If the conditions are not satisfied, Zurich contends that there is no coverage for accident benefits. Section 2.2.3 states:

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you. The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- *Liability,*
- *Accident Benefits,*
- *Uninsured Automobile, and*
- *Direct Compensation - Property Damage*

Special Conditions: For other automobiles to be covered, the following conditions apply:

- 1. Both the other automobile and a described automobile must not have a manufacturer’s gross vehicle weight rating (GVWR) of more than 4,500 kilograms.*
- 2. The named insured is an individual, or if the described automobile is owned by two people, the named insureds are spouses of each other.*
- 3. Neither you nor your spouse is driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.*
- 4. The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.*
- 5. For all coverages, except Accident Benefits, the other automobile cannot be an automobile that you or anyone living in your dwelling owns*

*or regularly uses. (For the purposes of this paragraph, we don't consider use of an automobile rented for 30 or fewer days to be regular use.) Nor can the other automobile be owned, hired or leased by your employer or the employer of anyone living in your household. However, if you drive one of these other automobiles while an excluded driver under the policy for that automobile, this policy will provide **Liability and Uninsured Automobile Coverages** while you drive that automobile.*

6. If you are a corporation, unincorporated association, partnership, sole proprietorship, business or other entity, the employee or partner for whose regular use a described automobile is supplied, and their spouse who lives with that person, will be covered when they drive the other automobile, under the following conditions:

- *Both the other automobile and the described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.*
- *Neither the employee nor partner who is provided with a described automobile, nor their spouses if they live with the employee or partner, are driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.*
- *The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.*
- *The other automobile must not be owned, hired, leased, or regularly or frequently used by you or by your employee or any partner, or by anyone living in the same dwelling as these persons.*
- *Except as provided under subsection 2.2.4, this policy doesn't cover the employee or partner or their spouse if they own, lease or rent any automobile and it is insured as the law requires and does not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.*

7. For Direct Compensation-Property Damage Coverage the other automobile cannot be a described automobile in a motor vehicle liability policy.

In support of this position Zurich refers to Section 1.3 of the OAPI which defines the "named insured" as the person or organisation to which the Certificate of Automobile Insurance is issued.

Section 1.3 of the OAP1 also specifies that the word “you” in the policy refers to the persons or organisations that are shown on the Certificate of Automobile Insurance as the named insured.

A review of Section 2.2.3 reveals that coverage will only be extended to “you” and “your spouse” who lives with you and “you” as noted above, is defined as the person or organisation shown on the Certificate of Automobile Insurance as being insured. The question then becomes whether or the specific conditions set out in Section 2.2.3 are met in this case. If not, Zurich submits there is no coverage under that policy.

A great deal of the submissions of the parties dealt with whether the special conditions were met and more specifically if special condition 5 or 6 applied. Zurich takes the position that special condition 6 could only apply as the named insured in this case was Yess Management a corporation. It further takes the positions that special conditions 1-5 apply only where the named insured is an individual.

A review of special conditions 6 essentially states that if you are a corporation, employee or partner for whose regular use or a described automobile is supplied that person would be covered when they drive an other automobile, only if none of the five cited exclusions apply.

The fourth exclusion states:

The other automobile must not be owned, hired, leased, or regularly or frequently used by you or your employee, any partner, or by anyone living in the same dwelling as these persons.

The Respondent, Unifund, submitted that the fourth exclusion of Section 2.2.3(6) did not exclude Mr. Sandhu because he was in Unifund’s submission, an independent contractor rather than an employee.

This requires an examination of Mr. Sandhu’s work history, as the distinction between an employee and an independent contractor is not always clear and depends, to a large degree, upon the particular facts of the case. The Supreme Court of Canada in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001SCC50 provided a non-exclusive list of factors one should consider in determining if an individual should be considered an employee or and independent contractor.

The question is whether the person performing the services is doing so as a person on one's own account or not. The level of control that the employer has over the worker's activities is an important factor as well as whether the worker provides his own equipment, whether he hires his own helpers, the degree of financial risk taken, the responsibility for investment and management held by the worker as well as the worker's opportunity for profit in performance of his task.

In the case before me, the evidence was that Mr. Sandhu had been working with Yess Management between July 22nd and the date of the accident, being October 14, 2014, or just short of three months. Mr. Sandhu did not drive his own truck during that time but trucks owned by Yess Management. He was responsible for pick-ups and deliveries. Mr. Sandhu himself had no financial or legal interest in Yess Management.

While Mr. Sandhu was working exclusively with Yess Management during this time frame he had worked with three different companies over the preceding twelve months. In addition, Mr. Sandhu had incorporated his own company, 2299393 Ontario Ltd. approximately five years prior to the accident and he billed the companies he worked with, including Yess Management, through this company. He then was paid by his own numbered company. In addition, and not surprisingly, he took advantage of the numerous tax incentives available to a small corporation. Yess Management Inc. did not make source deductions and remittances to Revenue Canada.

On balance, I am satisfied that Mr. Sandhu was an independent contractor rather than an employee. While there is some evidence to support the proposition that he was an employee, on balance I am satisfied that he was an independent contractor when one considers the criteria as set out in the "control test" or "business organisation test" as set out by the Supreme Court of Canada and followed by the lower courts.

Having decided that Mr. Sandhu was an independent contractor it is then apparent that the exclusions set out in Section 2.2.3 (6) do not apply as it is limited to employees or partners.

The Applicant, Unifund, submits that since Mr. Sandhu is not an employee and the exclusion is not applicable, Section 2.2.3 is applicable and since Mr. Sandhu is a listed driver under the

Zurich policy he is entitled to accident benefits from the insurer of an automobile with respect to which Mr. Sandhu as the occupant is an insured. In other words, Mr. Sandhu does not have to be a named insured to qualify for accident benefits from Zurich.

As noted above, Unifund relies on Section 268 of the Insurance Act and Section 3 of the Statutory Accident Benefits Schedule, cited above. In our case Mr. Sandhu would be what is commonly referred to as "listed driver" under the policy.

The Applicant refers in support of its position to the decision of Arbitrator Bialkowski in Pafco vs. Cumis General Insurance Company 2014 Carswell ONT4948, where the Arbitrator accepted that being a listed driver did entitle a person access to accident benefits when an occupant of an automobile other than the vehicle that is so listed. I note however, that the point was accepted by both parties to the arbitration and the issue as put before me was not argued. The primary issue before the arbitrator in that case was the effect of an excluded driver endorsement which, of course, is not the issue in our case.

As noted above Zurich argues that unless you have met the Special Conditions set out in Section 2.2.3 of the OAP1, then no accident benefits are provided by the policy for the other automobile.

In response, the Respondant relies upon the wording in the Ontario Automobile Policy (OAP1). Section 1.3 of the OAP defines named insured as the "person or organisation" that the Certificate of Automobile Insurance is issued. Section 1.3 specifies that the word "you" throughout the policy refers to the person or organisation shown on the Certificate of Automobile Insurance as the named insured. Section 1.3 differentiates between an automobile and a "described automobile". When an automobile is referred to as "described" reference is being made only to those automobiles specially shown on the Certificate of Automobile Insurance.

Section 2.1 of the OAP1 then provides that the Certificate of Automobile Insurance will specify which coverages have been purchased for each described automobile.

Section 2.2.3 of the OAP1, as set out above, then sets out to whom and on what conditions coverage will be extended "other automobiles".

Mr. Sandhu was a listed driver in the Zurich policy which was not involved in the accident and was therefore an “other” vehicle.

In my view the only way that Mr. Sandhu could then access accident benefits via the Zurich policy would be through Section 2.2.3 of the OAP1.

Section 2 of the OAP1 is very clear as to what automobiles are covered for insurance purposes and the coverage for other automobiles only applies if the conditions set out therein are met. In Mr. Sandhu’s case those conditions were not met.

Counsel for the Applicant argues that the provisions of the OAP1 cannot overrule the Insurance Act or the Schedule and cites the cases of Prasad vs. Gan Canada Insurance Company [1997] O.J. 1907 as well as Warwick vs. Gale [1997] Carswell ONT560 in support of this position.

I accept the reasoning of those decisions, however, they must also be read in conjunction with Section 227 (2) of the Insurance Act which states:

(2) Where, in the opinion of the Superintendent, any provision of this Part, including any statutory condition, is wholly or partly inappropriate to the requirements of a contract or is inapplicable by reason of the requirements of any Act, he or she may approve a form of policy, or part thereof, or endorsement evidencing a contract sufficient or appropriate to insure the risks required or proposed to be insured, and the contract evidenced by the policy or endorsement in the form so approved is effective and binding according to its terms even if those terms are inconsistent with, vary, omit or add to any provision or condition of this Part.

In the Prasad case, the Ontario Court of Appeal found there was no evidence that the Commission made a decision under Section 227(2) to approve for a form or policy inconsistent with the Act.

I also note that the current language found in Section 2.2.3 is now found in the section dealing with “What Automobiles are Covered?” and sets out in very clear and unambiguous language what conditions must apply for other automobiles to be covered.

Pursuant to Section 227(2) the Financial Services Commission of Ontario (FSCO) has the authority to approve the OAP1 and has done so. The OAP1 was approved by FSCO as of June 1, 2013. While FSCO's powers in this regard are not unlimited I am satisfied it acted within the scope and power granted to it under that section.

I am reinforced in this view by the decision of Arbitrator Novick, upheld by Justice Abrams in Canada (Finance) vs. Intact Insurance Company, 2013 ONSC1457. In that case, the Motor Vehicle Accident Claims Fund submitted the Section 2 (now Section 3) definition of "insured person" in the Statutory Accident Benefits Schedule operated to extend the coverage to a listed driver. Justice Abrams held that in order to extend the coverage to "another" vehicle the preconditions of Section 2.2.3 must be met and "listed driver" did not meet the definition of "you" or "your spouse".

For the reasons above I find that accident benefits are not available to Mr. Sandhu pursuant to the policy with Zurich Insurance Company.

In the event that the parties are unable to agree on the issue of costs I may be spoken to.

DATED at TORONTO, ONTARIO this 11th DAY OF SEPTEMBER, 2017.



M. Guy Jones
Arbitrator